



COMPANIES TRIBUNAL OF SOUTH AFRICA

Case Number: CT00861ADJ2021

In the *ex parte* application of:

RALLEN PROPRIETARY LIMITED
(Registration Number: 1967/006775/07)

Applicant

for an exemption from the requirement to appoint a social and ethics committee

Presiding Member : Khashane La M. Manamela (Mr.)

Date of Decision : 30 November 2021

Summary: Application for an exemption from the requirement to appoint a social and ethics committee (SEC), based on section 72(5)(b) of the Companies Act 71 of 2008 that “it is not reasonably necessary in the public interest to require the company to have a social and ethics committee, having regard to the nature and extent of the activities of the company”. Held, an exemption is granted for a period of 5 (five) years.

DECISION (Reasons and an Order)

Khashane La M. Manamela

Introduction

[1] Rallen Proprietary Limited (registration number 1967/006775/07) seeks an exemption from the statutory requirement to appoint a social and ethics committee (SEC). The requirement is in terms of section 72(5)(b)¹ of the Companies Act 71 of 2008 (the Companies Act). The applicant submits that it is not reasonably necessary in the public interest for it to appoint an SEC when regard is had to the nature and extent of its activities.²

[2] It is in the nature of the statutory provisions³ upon which the application is premised that the application is brought on an *ex parte* basis and, therefore, is unopposed.

Applicant's submissions / grounds for an exemption

[3] The applicant was incorporated on 26 June 1967. By then it was registered under the name Lening Construction Equipment Company Proprietary Limited. The name was changed to its current name on 09 September 1980.

[4] As with the companies incorporated or which existed in terms of the repealed Companies Act 61 of 1973, the applicant had specified objects or business activities.⁴ The business activities or objects are set out in the applicant's memorandum of association (MOA) filed with the papers in this application. But, it is submitted that the applicant's business activities have materially changed from those stated in its MOA.

¹ See pars [11]-[12] below for the reading of s 72 of the Companies Act 71 of 2008 in the material part.

² See par [12] below for the reading of s 72(5) of the Companies Act in the material part.

³ See pars [11]-[14] below.

⁴ Section 33 of the Companies Act 61 of 1973.

Currently the applicant's business is limited to the holding of investments in two companies, namely Rallen Australia Proprietary Limited (Rallen Australia) and Italtile Limited (Italtile), it is further submitted.

[5] This Tribunal is referred to the applicant's annual financial statements for the year ended 31 July 2020 (the 2020 AFS), also included in the papers for this application. The MOA states that the applicant "was incorporated in South Africa with interests in the investment holding industry"; it "operates in South Africa", and that there has been "no material changes to the nature of the company's business from the prior year".⁵ I hasten to point out that I do not consider the material quoted from the applicant's MOA to be confirmation for the statement that the applicant's business activities are limited to "holding investments" in the abovementioned two companies. I will revert to this issue, below.

[6] The two companies (i.e. Rallen Australia and Italtile) are briefly described as follows. Rallen Australia was incorporated as a private company in Australia. It has no operations in South Africa. Italtile is a South African public company with listed securities on the Johannesburg Stock Exchange.

[7] The applicant has 5 (five) shareholders. Four of its shareholders are individuals or natural persons, whilst the fifth shareholder is a trust. The board of directors of the applicant comprises 4 (four) directors: 1 (one) executive director and 3 (three) non-

⁵ 2020 AFS at p 4, par 1.

executive directors. The deponent to the applicant's founding affidavit is the only executive director and the only employee of the applicant, it is also submitted.

[8] This application was precipitated by the applicant attaining a public interest score⁶ (PI Score) of 608 for 2019 and a PI Score of 919 for 2020. It is submitted that despite this PI scores the applicant ought to be exempted from the requirement to appoint an SEC.

[9] The following are the further grounds or submissions by the applicant in support of the application for an exemption:

“19 Rallen's PI score for 2019 was 608 (“2019 score”) and 919 for 2020 (“2020 score”). A copy of the public interest calculation for 2019 and 2020 is attached hereto marked “FAS”. Rallen has in two years of the previous five years scored a PI Score of above 500 and is therefore required to establish an SEC. The Applicant submits that, for the reasons stated below, it is not reasonably necessary in the public interest, to require Rallen to have an SEC, having regard the nature and extent of the activities conducted by Rallen.

20 The Tribunal stated in its decision in the Ex parte application for exemption by Masimong Group Holdings Proprietary Limited [CT00734ADJ2021] that the purpose and function of an SEC is “an additional policing mechanism created to ensure that the company complies with relevant laws, other legal requirements and prevailing codes of best practice; and for the Board to monitor

⁶ See par [14] below for the reading of regulation 26(2) of the Regulations in the material part.

same if the nature and extent of the activities of the company warrant it in the public interest.

21 Rallen is an investment holding company and does not conduct any other operations. It holds only two investments, one in a foreign entity with no South African operations and the other in a South African public entity, listed on the JSE and which has its own SEC.

22 The activities of Rallen do not directly impact the environment or public health and safety.

23 Rallen does not sell any products or services and therefore does not have any customers or any third party liability.

24 I am the only employee employed by Rallen. Rallen has 3 other non-executive directors who are not employees of Rallen. My responsibilities as an executive director and the responsibilities of the board of directors of Rallen as a whole include ensuring that Rallen complies with all relevant laws and codes of best practice.

25 Rallen is a private company and does not have any public shareholders.

26 Taking into account the following:

26.1 the nature of the current business activities of Rallen being limited to investment holding and Rallen having no other operations;

26.2 the extent and impact of Rallen's business activities as set out in paragraphs 21 to 23;

26.3 *that the only South African investment held by Rallen is in a Johannesburg Stock Exchange listed company (i.e. Italtile) which has its own SEC; and*

26.4 *that Rallen has appointed an executive director whose responsibilities include ensuring compliance by Rallen with relevant laws and codes of best practice, the Applicant submits that the nature and extent of the activities of Rallen do not, in the public interest, warrant an additional policing mechanism to ensure compliance with relevant laws and codes of best practice in the form of an SEC and, it is therefore not reasonably necessary in the public interest to require Rallen to have an SEC.”⁷*

[italics and underlining added (the latter for emphasis), but footnote omitted]

Applicable legal principles and the grounds for an exemption (discussed)

Applicable legal principles

[10] As already indicated above, this application is primarily premised on the provisions of section 72(5) of the Companies Act. But the obligation to appoint an SEC is located elsewhere in section 72(4) of the Companies Act.

[11] Section 72(4) of the Companies Act reads in the material part:

“The Minister, by regulation, may prescribe -

(a) a category of companies that must each have a social and ethics committee, if it is desirable in the public interest, having regard to -

⁷ See pars 19-26 of the founding affidavit.

- (i) annual turnover;*
- (ii) workforce size; or*
- (iii) the nature and extent of the activities of such companies;*
- (b) the functions to be performed by social and ethics committees required by this subsection; and*
- (c) rules governing the composition and conduct of social and ethics committees.”*

[italics added]

[12] Section 72(5) of the Companies Act reads in the material part:

“A company that falls within a category of companies that are required in terms of this section and the regulations to appoint a social and ethics committee may apply to the Tribunal in the prescribed manner and form for an exemption from that requirement, and the Tribunal may grant such an exemption if it is satisfied that -

- (a) ...*
- (b) it is not reasonably necessary in the public interest to require the company to have a social and ethics committee, having regard to the nature and extent of the activities of the company.”*

[italics added]

[13] Section 72 is to be read with regulation 43 of the Companies Regulations, 2011 (the Regulations), which read in the material part:

“(1) This regulation applies to—

- (a) every state owned company;*
- (b) every listed public company; and*
- (c) any other company that has in any two of the previous five years, scored above 500 points in terms of regulation 26(2).*
- (2) A company to which this regulation applies must appoint a social and ethics committee unless—*
 - (a) it is a subsidiary of another company that has a social and ethics committee, and the social and ethics committee of that other company will perform the functions required by this regulation on behalf of that subsidiary company; or*
 - (b) it has been exempted by the Tribunal in accordance with section 72 (5) and (6).*
- (3) ...*
- (4) A company's social and ethics committee must comprise not less than three directors or prescribed officers of the company, at least one of whom must be a director who is not involved in the day-to-day management of the company's business, and must not have been so involved within the previous three financial years.*
- (5) A social and ethics committee has the following functions:*
 - (a) To monitor the company's activities, having regard to any relevant legislation, other legal requirements or prevailing codes of best practice, with regard to matters relating to -*
 - (i) social and economic development, including the company's standing in terms of the goals and purposes of—*
 - (aa) the 10 principles set out in the United Nations Global Compact Principles; and*
 - (bb) the OECD recommendations regarding corruption;*
 - (cc) the Employment Equity Act; and*
 - (dd) the Broad-Based Black Economic Empowerment Act;*
 - (ii) good corporate citizenship, including the company's—*

(aa) promotion of equality, prevention of unfair discrimination, and reduction of corruption;

(bb) contribution to development of the communities in which its activities are predominantly conducted or within which its products or services are predominantly marketed; and

(cc) record of sponsorship, donations and charitable giving;

(iii) the environment, health and public safety, including the impact of the company's activities and of its products or services;

(iv) consumer relationships, including the company's advertising, public relations and compliance with consumer protection laws; and

(v) labour and employment, including—

(aa) the company's standing in terms of the International Labour Organization Protocol on decent work and working conditions; and

(bb) the company's employment relationships, and its contribution toward the educational development of its employees;

(b) to draw matters within its mandate to the attention of the Board as occasion requires; and

(c) to report, through one of its members, to the shareholders at the company's annual general meeting on the matters within its mandate.”

[italics added]

[14] Another legal principle relevant to the determination to be made in this application is regulation 26(2) of the Regulations. It deals with the manner of calculation of the PI Score. The PI Score is used to determine whether a company, which is not a state owned company or a listed company, is required to appoint an SEC.⁸ This provision reads in the material part:

⁸ Regulation 43(1) of the Regulations.

“(2) For the purposes of regulation ... 43 ... every company must calculate its ‘public interest score’ at the end of each financial year, calculated as the sum of the following:—

(a) a number of points equal to the average number of employees of the company during the financial year;

(b) one point for every R 1 million (or portion thereof) in third party liability of the company, at the financial year end;

(c) one point for every R 1 million (or portion thereof) in turnover during the financial year; and

(d) one point for every individual who, at the end of the financial year, is known by the company—

(i) in the case of a profit company, to directly or indirectly have a beneficial interest in any of the company’s issued securities ...”

[15] Regulation 43(5) of the Regulations set out the functions of an SEC appointed for a company.⁹ The applicant submits that due to the nature and extent of its activities it is not reasonably necessary in the public interest for it to be required to appoint an SEC. This, as already appearing above, is the exemption located in the provisions of section 72(5)(b) of the Companies Act.¹⁰

[16] I deal with the reasons given to support these contentions, next. I will use the essence of the grounds for an exemption as self-explanatory subheadings.

⁹ See par [13] above.

¹⁰ See par [12] above.

The applicant has a sole executive director and, therefore, only a single employee

[17] The applicant says that the deponent to its founding affidavit is its only employee. He is also the only executive director of the applicant.

[18] Whilst I do not doubt the submissions made in this regard, I have noted from the 2020 AFS the references to a company secretary and “employee benefits”. It is not mentioned in the papers whether the company secretary is or is not employed by the applicant company. Also, the reference to “employee benefits” is not explained. However, I would accept that there are no other employees besides the executive director in the person of the deponent.

[19] Employees are relevant to a number of the functional areas of an SEC.¹¹ Therefore, the virtual absence of employees would be significant for the determination to be made in this application.

Applicant is an investment holding company with no other operations

[20] It is submitted that the applicant is only an investment holding company with no other operations or business activities in South Africa. Apart from its Australian interests, the applicant has local interest conducted through Italtile. It is submitted that Italtile has its own SEC, apart from being subjected to the listing requirements of the JSE.

[21] Further, it is submitted that the applicant’s activities are limited to the holding of its investment. I have already rejected this submission above. I have also differed with the

¹¹ See par [13] above.

view that the relevant averment in the 2020 AFS can serve as authority for the applicant's view in this regard,

[22] The authority for the applicant's objects or business activities is its MOA and/or the provisions of the Companies Act. The applicant's MOA as currently drafted is in very expansive terms. It is not limited to the area which the applicant has chosen to limit its business activities. This is of particular concern especially given the fact that an exemption granted by this Tribunal is valid for a period of 5 (five) years.¹²

Conclusion

[23] On the basis of what is appearing above, I am satisfied that "it is not reasonably necessary in the public interest to require the company to have a social and ethics committee, having regard to the nature and extent of the activities of the company".¹³

[24] However, the concerns expressed with regard to the unlimited nature of the applicant's activities made me consider granting the applicant an exemption for a period shorter than the conventional 5 (five) years. This was to cater for a possible change in the direction of the activities of the applicant, including away from its current activities. I decided against this limitation due to the fact that companies incorporated under the current Companies Act or existing in terms of its provisions do not inherently have the limitation of powers or objects.¹⁴ It would be unfair to decide the matter on the basis of what is contained in the applicant's MOA when available facts suggest that the applicant

¹² Section 72(6) of the Companies Act.

¹³ Section 72(5)(b) of the Companies Act.

¹⁴ See sections 19 and 20 of the Companies Act.

has gravitated away from those objects. The applicant may also decide to amend its MOA to invoke the unlimited powers or objects envisaged by the Companies Act.

Order

[25] In the result,

- a) the applicant is exempted from the requirement to appoint a social and ethics committee for a period of 5 (five) years from date of this order.

Khashane La M. Manamela (Mr.)

Member, Companies Tribunal

30 November 2021